

***United States Court of Appeals
for the Second Circuit***



**APPELLEE'S BRIEF
AND
APPENDIX**

To be argued by:
William J. Dreyer

Docket No. 77-1136

In The
United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

— against —

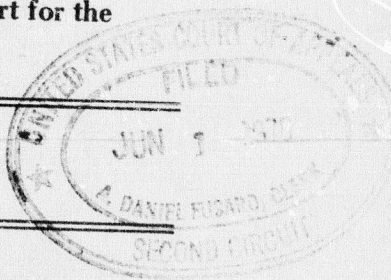
KEVIN T. COONEY,
HAROLD LEVY, JR.,
JOHN LEFEBVRE, and
BRUCE KAY,

Defendants-Appellants.

Appeal from the United States District Court for the
Northern District of New York

APPENDIX
BRIEF/FOR APPELLEE

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BRIEF FOR APPELLEE

ISSUES PRESENTED

1. Whether the evidence presented regarding the Tucson-Ithaca link was prejudicial in that it was in variance with the conspiracy for which the defendants were indicted.
2. Whether the trial court erred in denying the defendants an evidentiary hearing in regard to their standing to challenge the search of the Blossy vehicle.
3. Whether an evidentiary hearing or a new trial are necessary in regard to the jury's deliberative process.
4. Whether the government fulfilled its duty to the defense in disclosing its informer's name and all of its knowledge as to her whereabouts.
5. Whether due process of law was violated by the prosecutor's failure to elicit prior inconsistent statements of a witness before the grand jury.

TABLE OF CONTENTS

	Page
Issues Presented	i
Statement of the Case	1
Nature of Case and Course of Proceedings	1
Statement of Facts	2
POINT I — The evidence regarding the Tucson-Ithaca link was not in variance with the indictment because that link was part of the conspiracy for which the defendants were indicted	10
POINT II — The trial court did not err in denying the defendants an evidentiary hearing because the defendants did not allege any genuine issues of fact upon which a hearing could be held	15
POINT III — Neither an evidentiary hearing nor a new trial are necessary in regard to the jury's deliberative process because there was unanimous concurrence in the verdict by 12 jurors	19
POINT IV — The government fulfilled its duty to the defense by disclosing its informer's identity and all of its knowledge as to her whereabouts	26
POINT V — Due process was not violated by the prosecutor's failure to elicit prior inconsistent statements of a witness before the grand jury	27
Conclusion	32
APPENDIX:	
Extract of Trial Testimony - Paul Moscovitz	A1
Prior Inconsistent Statement of Paul Moscovitz, Extracted from Defendant's H	A6
Grand Jury Testimony of Margaret Beucher	A7

Table of Cases:

<i>Alderman v. United States</i> , 394 U.S. 165 (1969)	16
<i>Amos v. United States</i> , 496 F.2d 1269 (8th Cir. 1974) cert. den. 419 U.S. 896 (1974)	22, 24
<i>Brown v. United States</i> , 411 U.S. 223 (1973)	16
<i>Grace Lines, Inc. v. Motley</i> , 439 F.2d 1028 (2d Cir. 1971)	23
<i>Jackson v. United States</i> , 128 U.S. App. D.C. 214, 386 F.2d 641 (1967)	24, 25
<i>Roviaro v. United States</i> , 353 U.S. 53 (1957)	26, 27
<i>Sendejas v. United States</i> , 428 F.2d 1040 (9th Cir. 1970) .	18
<i>Williams v. United States</i> , 136 U.S. App. D.C. 158, 419 F.2d 740 (1969)	22
<i>United States v. Agueci</i> , 310 F.2d 817 (2d Cir. 1962) cert. den. 372 U.S. 959 (1963)	11, 13
<i>United States v. Basurto</i> , 497 F.2d 781 (9th Cir. 1974)	29, 30
<i>United States v. Bertolotti</i> , 529 F.2d 149 (2d Cir. 1975) . .	13
<i>United States v. Bynum</i> , 485 F.2d 490 (2d Cir. 1973), vacated on other grds. 417 U.S. 903 (1974)	13
<i>United States v. Duke</i> , 527 F.2d 386 (5th Cir. 1976)	22
<i>United States v. Galante</i> , 547 F.2d 733 (2d Cir. 1976) . . .	18
<i>United States v. Guilette</i> , 547 F.2d 743 (2d Cir. 1976) . . .	29
<i>United States v. Hinton</i> , 543 F.2d 1002 (2d Cir. 1976) . . .	15
<i>United States v. Jeffers</i> , 342 U.S. 48 (1951)	18
<i>United States v. Kennedy</i> , 564 F.2d 1329 (9th Cir. 1977) .	30
<i>United States v. Lockhart</i> , 366 F.Supp. 843 (E.D.Pa. 1973)	22
<i>United States v. Moten</i> , 564 F.2d 620 (2d Cir. 1977) .	13, 14
<i>United States v. Panebianco</i> , 543 F.2d 447 (2d Cir. 1976) .	11

Table of Cases (cont'd.):

<i>United States v. Provensano</i> , 440 F. Supp. 561 (S.D.N.Y. 1977)	31
<i>United States v. Ruyle</i> , 524 F.2d 1133 (6th Cir. 1975) cert. denied 425 U.S. 934 (1976)	30
<i>United States v. Sexton</i> , 456 F.2d 961 (5th Cir. 1972) ...	22
<i>United States v. Smith</i> , 550 F.2d 277 (5th Cir. 1977)	17
<i>United States v. Sperling</i> , 506 F.2d 1323	13
<i>United States v. Steinberg</i> , 525 F.2d 1126 (2d Cir. 1975) .	11
<i>United States v. Super</i> , 492 F.2d 319 (2d Cir. 1974), cert. denied 419 U.S. 876 (1974)	27
<i>United States v. Taylor</i> , 562 F.2d 1345 (2d Cir. 1977) 13, 14,	15
<i>United States v. Thorensor</i> , 428 F.2d 654 (9th Cir. 1970) 17	
<i>United States v. Tortorello</i> , 533 F.2d 809 (2d Cir. 1976) cert. denied 429 U.S. 894 (1976)	16
<i>United States v. Tramunti</i> , 413 F.2d 1087 (2d Cir. 1975) cert. denied 423 U.S. 832 (1975)	15
<i>United States v. Turbide</i> , 558 F.2d 1053 (2d Cir. 1977) ..	26

STATEMENT OF THE CASE

Nature of Case and Course of Proceedings.

On February 4, 1976, defendants Kevin Cooney, Harold Levy, John LeFebvre and Bruce Kay, and thirteen others were charged with unlawfully conspiring from June, 1972 to June, 1975, at or near Albany, New York and elsewhere, to distribute marijuana, in violation of 21 United States Code, Section 846.

A jury trial before the Honorable James T. Foley commenced on December 1, 1976. During trial, the government called nine witnesses: Robert Roth (tr. 159-415)¹; Marc Cohen (tr. 416-553); William Katz (tr. 603-871; 892-972); Paul Cammusa (tr. 1014-1276); Paul Moscowitz (tr. 1278-1604); Sergeant Robert Tripeer, New Mexico State Police (tr. 1650-1682); Michael Hauser (tr. 1701-1722); Sergeant Charles Ring, New Mexico State Police (tr. 1722-1771); and Special Agent James Montagne, United States Department of Justice, Drug Enforcement Administration (tr. 1773-1875). Roth, Cohen, Katz and Hauser were indicted co-conspirators who appeared at trial as witnesses after charges against them were disposed of by pleas of guilty or dismissal. Cammusa and Moscowitz were unindicted accomplices who testified before the grand jury.

On December 22, 1976, the four defendants were convicted of conspiracy. On February 22, 1977, defendants Cooney and Levy were sentenced to eighteen months imprisonment with a special parole term of two years; defendants Kay and LeFebvre were sentenced to six months imprisonment with a special parole term of two years. The four defendants appeal from the judgments of conviction.

1. "(tr. -)" refers to pages of the trial transcript.

STATEMENT OF FACTS

a. Summary of Testimony

In the latter part of June, 1972, Robert Roth, an acquaintance of defendant Kevin Cooney at the State University of New York, Albany, New York, was invited to Cooney's Albany home to meet with Cooney and defendant Harold Levy. During the meeting (tr. 163-167) Cooney stated that he was moving to Tucson, Arizona where he would be in charge of shipping marijuana to Levy in Albany, New York. Cooney explained that shipments would be made by car and asked Roth to drive for a fee of \$500.00 - \$1,000.00 per trip, and for a reduced "Tucson" price for marijuana that Roth wished to obtain. Roth declined the offer, but began in the fall of 1972 to visit Levy to buy marijuana and to socialize. During the fall of 1972, after he turned down a second offer to drive, Roth observed one of the first of the new business' shipments arrive at Levy's home by a car driven by Marc Cohen. Roth purchased about 30 to 50 pounds of marijuana from the 100-pound load. It was also during this period that Roth came to know other principal figures in the Cooney-Levy business, having been present when William Katz introduced defendant John LeFebvre (tr. 182-183) to Levy as a potential customer, and when Paul Moscovitz and defendant Bruce Kay were present at Levy's house to socialize or buy marijuana (tr. 186-188).

In August, 1973, while on a cross-country trip, Roth visited defendant Cooney in Tucson, Arizona. During the visit (tr. 190-195) Cooney told Roth that he obtained the marijuana in Mexico from a man named "Pasquale"; that the business had grown so that his goal was to have one car traveling west with money while another traveled east with marijuana; and that

his business extended to Albany, the midwest, and to the Ithaca (New York) area.

After Roth returned to Albany in the summer of 1973, he began to visit Levy at the latter's new home in Crescent, New York (a suburb of Albany). Thereafter, he was present and shared in distribution when defendant Bruce Kay arrived at Levy's home with carloads of marijuana ranging from 300-500 pounds on two occasions in the fall of 1973, (tr. 198-203), and in the last weeks of February, March, April, and May, 1974 (tr. 205-211). In June, 1974, Roth moved to Florida to attend law school, thereby ending his association with Levy.

The second witness, Marc Cohen was an acquaintance of Cooney and Levy from the University and during earlier years in Syosset, New York. (tr. 420). Sometime after Roth declined to drive for Cooney, defendant Levy approached Cohen and asked him to drive. After first refusing, Cohen agreed to drive, and in the winter of 1972-73 made two trips to the home of Cooney in Tucson (tr. 422-448), each time delivering money to Cooney and returning to Levy's house with a load of marijuana in a car purchased by Cooney and registered in Cohen's name.

In April, 1973, Cohen made a third trip to Tucson, and delivered a package of money to Cooney. After waiting a few days, Cohen decided not to drive a load back. He flew back to Albany and ended his association with the defendants.

The third witness, William Katz, was socially acquainted with Cooney and Levy and was a roommate of Marc Cohen and defendant LeFebvre. Through an introduction by Cohen in November, 1972, Katz, himself a dealer, tried to sell marijuana to Levy (tr. 610-11). Levy refused and told Katz that he, Levy, would have marijuana for sale. Thus, in January, 1973, Mr.

Katz became a customer of Levy. In March, 1973, after two sales to Katz, Levy offered Katz a fee of \$1,000.00 - \$1,200.00 per trip to drive loads from Tucson to Albany (tr. 619). Katz agreed and in April, 1973, flew to Tucson where he met defendant Cooney. After a few days' wait, Mr. Katz drove a car registered to Marc Cohen, equipped with heavy duty shock absorbers, and loaded with marijuana, to the home of Levy in Albany (tr. 620-627).

In May, 1973, Katz made a second trip, this time by car, to Cooney's home in Tucson. After delivering a package of money to Cooney (tr. 630) Katz elected to fly back to Albany without marijuana.

During the following months of 1973, Katz continued to visit Levy socially and to purchase marijuana. In March, 1974, due to the presence of repairmen at Levy's home, Katz agreed to accept in his home a load of marijuana bought by Bruce Kay (tr. 649-650) to Albany in a pickup truck with a camper top. After this delivery, Kay and Katz began discussing the possibility of dealing directly with Cooney (tr. 654-655).

In September, 1974, Katz made his last trip to Tucson to drive marijuana from Cooney to Levy (tr. 667-669). It was after this trip that Katz met Levy at his Crescent home, and had a conversation reflected in the following testimony:

BY MR. DREYER:

- Q What did Mr. Levy tell you at that time?
A As I recall Mr. Levy told me that someone who was driving in the same capacity that I had in the past, had been --

MR. LEBETKIN: I object to that characterization, 'in the same capacity'.

THE WITNESS: Someone who was driving for himself had been stopped in New Mexico and a large quantity of money had been taken from the person by authorities.

BY MR. DREYER:

Q And did he tell you anything else; did he tell you how much?

A He gave me a figure which I recall to be approximately twenty-thousand dollars to twenty-five thousand dollars.

Q And did he say anything else to you about that quantity of money?

A He was in -- he went into a lengthy conversation about his responsibilities for --

MR. LEBETKIN: I object.

THE COURT: You cannot describe it that way. Just tell us if you recall what he said, and his words, and not what your words were.

THE WITNESS: Mr. Levy told me he was responsible for half of the loss of whatever money would be lost, because of these problems. (tr. 673-674)

THE WITNESS: Mr. Levy told me that someone who was driving for him had lost a quantity of money in New Mexico. He told me the quantity was between twenty thousand dollars and twenty-five thousand dollars, to the best of my recollection, and that he was responsible for half of this monetary loss. (tr. 675).

In the spring of 1975, Katz disassociated himself from defendant Levy.

The next witness, Paul Cammusa, was a customer of William Katz and defendant John LeFebvre. Having had various transactions with Katz and LeFebvre in 1973 and 1974, which were linked to Levy, (tr. 1014-1050), Cammusa decided in 1974 that he wanted to make more money. After a proposed venture with Katz failed (tr. 1050) Cammusa approached one Paul Moscovitz in November, 1974, and asked him to arrange a connection with someone in Arizona. Moscovitz said he was a very good friend of defendant Cooney and would attempt to get Cooney and Cammusa together. (tr. 1053). One week later, Cammusa visited Moscovitz and asked about the proposed arrangement. whereupon Moscovitz replied that he would not be able to arrange the connection because there had been a "problem" involving the confiscation of a large amount of money from a driver in Texas (tr. 1055). Moscovitz confirmed (tr. 1341) that Cammusa approached him in November, 1974, to arrange large purchases of marijuana from defendant Cooney, and that he, Moscovitz, was unable to do so. During his testimony, Moscovitz recounted the various transactions he had with Levy and Cooney, and the various loads driven to Levy's house by Kay, LeFebvre and others. He then testified that he was told by Levy that one "Andrew Blossy" had been stopped in New Mexico and that a large quantity of money had been seized. (tr. 1578).

In September, 1974, Michael Hauser, of Ithaca, New York, sent one Andrew Blossy, a grand jury witness not available at trial, to Tucson, Arizona in an automobile registered in the name of "Cihocki" to deliver \$25,000.00 obtained from marijuana sales in Ithaca to Kevin Cooney. (tr. 1702-1708). On September 27, 1974, Blossy was stopped for speeding by state police in New Mexico, and the money, a box of shock absorbers, and a slip of paper bearing Cooney's telephone number were seized with the consent of Blossy.

DEA Agent James Montagne, called to the scene by the state police, used the telephone number and information provided him by Blossy to call Cooney on the evening of September 27, 1974. Posing as Blossy, Montagne told Cooney that his car broke down in New Mexico, whereupon Cooney told him to get the money to Tucson. Montagne asked if he could drive a load of marijuana for \$1,000.00, and Cooney responded that Montagne could drive a load but that it would take a couple of days to get the load ready.

Finally, in June, 1975, defendant Levy withdrew from the business and turned his part in the operation over to defendant Bruce Kay. (tr. 1063). At a meeting at the Friar Tuck Pub in Latham, New York, in June, 1975, Levy and Kay told Paul Cammusa that Kay would now be able to supply the marijuana Cammusa needed.

b. Availability of Margaret Beucher.

On the opening day of trial, counsel for defendant Levy, aware that a grand jury witness, Margaret Beucher, was not available for trial, requested that the government outline its efforts to locate the witness. (tr. 17). The following colloquy occurred.

THE COURT: Why all this mystery?
Does anybody know where Margaret Beucher
is?

MR. DREYER: The Government does
not.

THE COURT: All right. She may be
in Albany. At least she has some Albany
connections.

MR. DREYER: There is one question
I would bring to the attention of the Court
because Mr. Lebetkin raised it with me in

prior discussions. There was a time when Miss Beucher was registered as a confidential informant with the Drug Enforcement Administration, but to the best of my knowledge at this time, there was no requirement on the part of Miss Beucher to report back to the Drug Enforcement Administration on account of her status as a confidential informant. Nevertheless, after she appeared at the Grand Jury, she advised the Government that she would notify us where she would be. That is, she would notify the Drug Enforcement Administration. She has not. Now, if the defense has other information that would be helpful to the Court, I request they come forward and tell the Court, because frankly, the Government would like to call her if we could. *

MR. LEBETKIN: Judge, I would simply say this: I think the Court has a right to know whether or not the Government has made the same diligent effort to locate this witness that they would make to locate one of the defendants if he were not here today. (tr. 18-19).

The court declined to require the government to record what efforts were made to locate Miss Beucher. Additionally, the grand jury testimony of Margaret Beucher was furnished to the defense on December 8, 1976. (tr. 888).

c. Alleged Perjured Testimony of Paul Moscovitz

During the cross-examination of Moscovitz by defendant Levy's counsel (tr. 1499-c) the following exchange occurred:

BY MR. LEBETKIN:

Q And you never told Mr. Dreyer that you were lying, I am sure of that?

A Is it your statement that I lied to the Grand Jury?

Q Did you ever tell Mr. Dreyer that you lied?

A On one statement, yes.

Q On one?

A Yes. (tr. 1499-c)

Moscowitz previously testified under cross-examination by Cooney's counsel² concerning a discrepancy between his trial/grand jury testimony, wherein he stated that he alone drove a load of marijuana from Cooney's Tucson home to Levy's Albany home in June, 1974, and a statement previously made to DEA case Agent Tripp³, provided to the defense under 18 United States Code, Section 3500 eleven days before Moscowitz testified, wherein he stated during one interview that he and his girlfriend, Margaret Beucher, drove the load together, and in another that he and Beucher had not driven the load back to Albany but flew back after a dispute arose over the fee to be paid for transporting the load.

Moscowitz explained at trial that he originally implicated Beucher because he was angry at her and wanted her indicted. When he testified before the grand jury he stated that he alone drove the marijuana from Tucson, to Albany, as he so testified at trial,

². relevant cross-examination of Moscowitz (tr. 1412-1416) is set forth in the appendix to this brief.

³. Defense exhibit H, prior statement of Moscowitz, dated September 25, 1975, is set forth in the appendix to this brief.

but did not advise the grand jury of the prior inconsistent statements. He further testified that "from what I understand, he (the prosecutor) was supposed to have learned it (the discrepancies) from Mr. Tripp." (tr. 1414). With respect to Moscovitz' claim that he made the trip west and that he alone drove the marijuana from Tucson to Albany, the government called Margaret Beucher before the grand jury. Her testimony⁴ disclosed that she went to Tucson with Moscovitz in June, 1974, and stayed with the Cooneys. After a few days, Moscovitz drove a car load of marijuana back to Albany alone, while Beucher stayed in Tucson with the Cooneys.

POINT I

THE EVIDENCE REGARDING THE TUCSON-ITHACA LINK WAS NOT IN VARIANCE WITH THE INDICTMENT BECAUSE THAT LINK WAS PART OF THE CONSPIRACY FOR WHICH THE DEFENDANTS WERE INDICTED.

Defendants Cooney, Levy, Kay and LeFebvre were indicted for conspiracy to distribute marijuana "from the month of June, 1972 through the month of June, 1975 at or near Albany ... and elsewhere ..." During the trial, testimony was admitted implicating defendant Cooney in marijuana dealings with co-conspirator Michael Hauser in Ithaca. It is the contention of the defendants that the admission of this evidence relating to the transactions between Cooney in Tucson and Hauser in Ithaca was prejudicial error in that the Tucson-Ithaca link constituted a separate conspiracy and is thus in variance with the crime charged in the indictment.

⁴. Grand jury transcript (pp. 124-131) is set forth in the appendix to this brief.

The defendants' assertion that the evidence produced at trial reveals two separate conspiracies -- the first running between Tucson and Albany and the second running between Tucson and Ithaca -- with Cooney supplying marijuana to two separate operations is completely without merit in light of the evidence admitted at trial. The government urges that the Tucson-Ithaca connection and the Tucson-Albany link comprised a single conspiracy and that there was no variance in producing evidence relating to the Tucson-Ithaca link because it was part of the single conspiracy for which the defendants were indicted.

As this Court has recently recognized, "it is well settled that individual customers and supplier are members of one overall conspiracy if they are aware of the size of the middleman's operation." United States v. Panebianco, 543 F.2d 447 (2d Cir. 1976). See United States v. Steinberg, 525 F.2d 1126 at 1133 (2d Cir. 1975). Also, as this Court announced in United States v. Agueci, 310 F.2d 817 (2d Cir. 1962), cert. denied, 372 U.S. 959 (1963), "an individual associating himself with a chain conspiracy knows that it has a scope and that for its success it requires an organization wider than may be described by personal participation...."

As demonstrated by the government's evidence, there was ample knowledge of the various co-conspirators in Albany as to the scope of the operations of which they all were a part. This becomes evident from the testimony of Robert Roth, William Katz, Paul Cammusa and Paul Moscowitz. As early as the summer of 1973, Cooney advised Roth, a lower-tier conspirator in the sense that he restricted his activities to relatively small purchases of marijuana, that the operation extended to Ithaca and other places. Accordingly, Roth was put on notice that the organization had a scope wider than his minimal role might otherwise indicate. Convicted co-conspirator William Katz, like

defendants Kay and LeFebvre, assumed a greater role by driving marijuana from Tucson to Albany. Katz testified that Levy told him of the arrest of Andrew Blossy in New Mexico and that Levy claimed that he sustained a loss of half of the \$25,000 seized from Blossy. Obviously, Levy and driver Katz knew of the scope of the operation so far as it stretched from Tucson to Ithaca. Indeed, Levy's statement tends to establish not only knowledge of scope, but also that he had a sizable financial stake in this aspect of the operation.

Levy's knowledge of the operation is further corroborated by co-conspirator Paul Moscovitz, also a transporter of marijuana from Tucson to Albany, when he testified that Levy told him that a driver had driven some money across the country and had been stopped in New Mexico. The intricate communications among the parties to the conspiracy were such that even Paul Cammusa, a small time purchaser who failed to make a direct connection with Cooney, became aware of the Blossy incident soon after the occurrence.

Defendant Cooney's participation in the Tucson-Ithaca link of the operation is not contested on appeal. Kevin Cooney, however, was the terminal to which Blossy was headed as evidenced by the testimony of Michael Hauser and James Montagne and was, therefore, the link which connects the Albany and Ithaca facets to the operation.

There is no direct evidence that defendants LeFebvre and Kay were aware of the Tucson-Ithaca link of the operation. However, from the evidence presented at trial, it is clear that LeFebvre and Kay were regular drivers who were at a higher level in the organization than Roth, Cammusa, Kay or Moscovitz. In fact, by 1975, Kay assumed Levy's duties in Albany when the latter withdrew from the business. Accordingly,

especially in view of the close business and social relationships of the defendants and the witnesses above mentioned, it must be inferred that Kay and LeFebvre knew of the extent of the conspiracy of which they were involved and of the many other drivers and distributors. The knowledge of alleged co-conspirators Katz and Moscowitz, whose involvement in the operation was analogous to that of Kay and LeFebvre, is particularly persuasive of the validity of this inference. See United States v. Sperling, 506 F.2d 1323 at 1340, (2d Cir. 1974), United States v. Bynum, 485 F.2d 490 (2d Cir. 1973), vacated on other grds. 417 U.S. 903 (1974).

The fact that not all of the co-conspirators may have known or worked with one another is insignificant since it is clearly established that each knew from the scope of the operation that others were involved in the performance of functions vital to the success of the business, United States v. Sperling, supra; United States v. Bynum, supra. Thus, the fact that the Albany co-conspirators did not personally know Blossy or co-conspirator Hauser or even other Albany conspirators is irrelevant in finding a single conspiracy.

The government's assertion is further buttressed by the facts of this case which are consistent with the patterns of evidence apparent in cases in which this Court has found no variances to exist. See United States v. Taylor, 562 F.2d 1345 (2d Cir. 1977); United States v. Moten, 564 F.2d 620 (2d Cir. 1977); United States v. Agueci, supra. As this Court pointed out in United States v. Bertolotti, 529 F.2d 149 at 154-55 (2d Cir. 1975).

Despite the existence of multiple groups within an alleged conspiracy, we have considered them a part of an integrated loose-knit combinations in instances where there existed "mutual dependence and assistance" among the spheres , a common aim or purpose among the

participants . . . , or a permissible inference from the nature and scope of the operation that each actor was aware of his part in a larger organization where others performed similar roles equally important to the success of the venture.

As indicated above, each of these requisites for a single conspiracy have been met by the uncontroverted evidence produced by the government. 1) "Mutual dependence and assistance" among the spheres was illustrated by Levy's financial interest in the Ithaca link of the operation, and his subsequent loss when one of the Tucson-Ithaca runners was arrested and had his money confiscated. The mutuality of dependence of the two subdivisions of the conspiracy is further evidenced by their common dependence on defendant Cooney for their supply of marijuana. 2) "A common aim or purpose among the participants" is implicit in the operation, i.e., to transport marijuana from Tucson to Albany, Ithaca and elsewhere, so as to make a profit from its distribution. 3) The "permissible inference from the nature and scope of the operation... that others performed similar roles" is especially applicable to LeFebvre and Kay. In light of the fact that other drivers and lesser actors on the Tucson-Albany link, i.e., Moscovitz and Katz, and Roth and Cammusa, were aware of the Tucson-Ithaca connection, it can be permissibly inferred that co-conspirators Kay and LeFebvre also had such knowledge.

The defendants also attach great importance to the failure of the indictment to allege activity in Ithaca. In United States v. Moten, supra, this Court ruled that the "claim that the conspiracies became discrete by reason of the territorial separation of the distributors must be rejected." Similarly, in United States v. Taylor, supra, this Court decided that "while appellants had their principal operations in two cities, New York and Washington, with the supplier operating from

another location, the evidence of a common source justified treatment of the two spheres as one general business venture." *id.* at 1351. Also, see United States v. Tramunti, 513 F.2d 1087 (2d Cir. 1975), cert. denied, 423 U.S. 832 (1975). Thus, in regard to the case presently before the Court, the fact that the conspiracy extended beyond the Tucson-Albany link is immaterial. Rather, what is salient is "the consistency of personnel, method and type of the operation" United States v. Taylor, *supra*, United States v. Hinton, 543 F.2d 1002 (2d Cir. 1976), at 1014.

In conclusion, the government submits that Cooney and Levy joined together in a single conspiratorial organization encompassing Albany and Ithaca and other places. Michael Hauser was not a separate spoke in a wheel conspiracy, but rather another distributor whose success in getting the marijuana into the hands of the customer directly affected the financial condition of Cooney and Levy and therefore, the success of the venture. Other distributors and transporters who joined the Cooney-Levy operation thereby gained knowledge of what they were responsible for either from the very nature of the enterprise or directly from Cooney and Levy.

POINT II

THE TRIAL COURT DID NOT ERR IN DENYING THE DEFENDANTS AN EVIDENTIARY HEARING BECAUSE THE DEFENDANTS DID NOT ALLEGE ANY GENUINE ISSUES OF FACT UPON WHICH A HEARING COULD BE HELD.

It is the contention of defendants Cooney and Levy that the trial court erred in denying them an opportunity to demonstrate through an evidentiary hearing that they have standing to object to the search of the Blossy vehicle. The government urges that the defendants to not

have standing to challenge that search. The government further asserts that an evidentiary hearing was not required because the defendants made no genuine allegations of fact which would have enabled the trial court to grant them standing to challenge the search.

The Supreme Court has held that "suppression of the product of a Fourth Amendment violation can be urged only by those whose rights were violated by the search itself, not by those who are aggrieved by the introduction of the damaging evidence." Alderman v. United States, 394 U. S. 165 171-72, 89 S.Ct. 961, 165 (1969); United States v. Tortorello, 533 F.2d 809, 814 (2d Cir. 1976).

This general principal was further refined in Brown v. United States, 411 U.S. 223, 93 S.Ct. 1565 (1973):

In deciding this case, therefore, it is sufficient to hold that there is no standing to contest a search and seizure where, as here, the defendants: a) were not on the premises at the time of the contested search and seizure; b) alleged no proprietary or possessory interest in the premises; and c) were not charged with an offense that includes as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure.

During the arguments of counsel as to whether the Court should grant an evidentiary hearing, counsel for the defendants made no genuine allegations of fact which would entitle them to standing to contest the search of the Blossy automobile under the criteria set out in Brown, supra. In regard to criteria (a) and (c) of Brown, the defendants make no claim to standing under those requirements because none of the defendants were on the "premises" at the time of the search, and none are charged with a possessory

offense. Rather, they rest their claim on criteria (b) alleging a proprietary or possessory interest in the premises, i.e., the vehicle.

The defendants' assertion of a "constructive possessory or proprietary" interest in the Blossy vehicle is based on the testimony of Marc Cohen, who testified that defendant Cooney purchased, in conjunction with Cohen, a green Polara in March 1973. The defendants conclude that since Cooney had an interest in a car purchased a year and one half earlier, that he must have had an interest in the Blossy vehicle. At no time during the preliminary arguments did the defense contend that Cooney or any of the other defendants had actually contributed to, or had an interest in the purchase of the Blossy vehicle, nor were there any allegations that any of the defendants had ever personally used the car. Thus, from the defense counsel's arguments, no apparent proprietary or possessory interests were alleged. Accordingly, no genuine factual issues were presented upon which to hold an evidentiary hearing. The defendants are entitled to an evidentiary hearing only when there is a preliminary showing of a genuine issue of fact, as in the case of United States v. Thorenson, 428 F.2d 654, 666-667 (9th Cir. 1970). In the present case the defendants' bald allegation on appeal of a proprietary interest in the Blossy vehicle is not sufficient to entitle them to an evidentiary hearing.

The defendants further assert that Cooney & Levy had a possessory interest in the money seized, as the government alleged, and, therefore, had standing to object to the search and seizure. According to Brown, *supra*, standing is conferred only when there is an interest shown in the premises searched, rather than in the property seized. This view is supported by United States v. Smith, 550 F.2d 227 (5th Cir. 1977)

where it was held that ownership of the articles seized does not, alone, confer standing to challenge their seizure.

The defendants assert that this reading of Brown is inconsistent with United States v. Jeffers, 342 U. S. 48 (1951). However, this Court in United States v. Galante, 547 F. 2d 733, 739 n. 11 (2nd Cir. 1976) construed the Jeffers case to provide a basis for standing when a "particular defendant was the intended object of the search." The evidence establishes that the search of the Blossy vehicle did not have as its object the seizure of property owned by one of the defendants as was the case in Jeffers. Confer also, Sendejas v. United States, 428 F. 2d 1040 (9th Cir. 1970).

In conclusion, the trial court was not in error in denying the defendants an evidentiary hearing in regard to their standing to challenge the search of the Blossy vehicle, a search that was made with Blossy's consent, because (1) no genuine issues of fact were alleged by the defendants during the preliminary arguments on whether to have a hearing, (2) only the bald allegation that defendant Cooney had a "constructive proprietary" interest in the Blossy vehicle was proffered in that he had helped purchase a vehicle used for similar purposes a year and one half earlier, (3) there were no allegations that Cooney or any of the other defendants had an actual interest in the vehicle (premises) searched, and (4) mere interest in the property seized in the instant case does not entitle the defendants to standing.

POINT III

NEITHER AN EVIDENTIARY HEARING NOR A NEW TRIAL ARE NECESSARY IN REGARD TO THE JURY'S DELIBERATIVE PROCESS BECAUSE THERE WAS UNANIMOUS CONCURRENCE IN THE VERDICT BY 12 JURORS.

The defendants' contention that an evidentiary hearing or a new trial should be held because of "irregularities" in the jury's deliberative processes is without merit. The central contention of the appellants centers upon the polling of juror number 10, Judith Earl, after a verdict of guilty was announced by the foreman in the instant case. After responding "guilty" to the poll conducted by the Clerk of the Court as to the first three defendants, Miss Earl responded to the poll concerning Bruce Kay, as follows: "I would like to say not sure, but I say guilty because of the others realizing that all ..."

At the outset, the government contends that the claims of appellants Cooney, Levy and LeFebvre are without foundation inasmuch as Miss Earl, upon being questioned by the Court, stated that there was no coercion placed upon her, and further stated: "I mean the only one I felt unsure of, having any doubt on, was the last defendant, was Bruce Kay" (tr. 2310). Thus, there is no question as to validity of the verdicts of Cooney, Levy and LeFebvre.

In regard to appellant Kay's assertion that he was convicted by a jury which included a juror who harboured a reasonable doubt as to his guilt, it is the government's position that Miss Earl's response did not constitute a dissenting vote. Rather, it is the government's contention that Miss Earl's apparent ambivalence stemmed from her reluctance in arriving at a difficult decision that appellant Kay was guilty beyond a reasonable doubt.

It is not abnormal for a juror to have feelings of ambivalence in finding a defendant guilty. Since a juror's duty to sit in judgment of a fellow human being is one of the most serious and difficult duties a citizen must perform, Miss Earl's response simply mirrored her perception of the profundity and importance of her responsibility. Her expression of reluctance is one indicia of the difficult job of sitting in judgment of another, and finding that person guilty beyond a reasonable doubt.

The genesis of Miss Earl's reluctance is illustrated by the following exchange between Miss Earl and the Court:

THE COURT: Miss Earl, I am going to ask you particularly on this last call that we had: Did you surrender any convictions because of any pressures on you or is that your judgment that you find that this defendant Kay is guilty? You have to use your own judgment.

JUROR NO. 10, JUDITH EARL: I definitely feel pressures.

THE COURT: What did you say?

JUROR NO. 10, JUDITH EARL: I definitely feel pressures.

THE COURT: I can't hear you.

JUROR NO. 10, JUDITH EARL: I definitely feel pressure on this decision.

THE COURT: What kind of pressure? Did you listen to the opinions of the other jurors?

JUROR NO. 10, JUDITH EARL: Yes, I have requested that we ask you Honor to review the legal advice or the legal charge that you gave us about the conspiracy relating to the part where they said that they would have to be involved in

only a small portion of the conspiracy or not to be convicted --

THE COURT: Well, isn't that--

JUROR NO. 10, JUDITH EARL: I don't know.

THE COURT: Wasn't that made clear to you?

JUROR NO. 10, JUDITH EARL: The other point that I had some doubt on, and I am only saying this because of my reasonable doubt and I feel that it is reasonable, was the points that were made about Bruce Kay taking over the conspiracy, and I felt that I have reasonable doubt about that.

THE COURT: Well, I have to inquire because we are in an awkward position. You were polled here and the question is, do you find Kay guilty under the law as I charged you and on the testimony given in this case. How old are you?

JUROR NO. 10, JUDITH EARL: 25.

THE COURT: And was any coercion placed upon you to return a verdict here?

JUROR NO. 10, JUDITH EARL: No. I don't -- I mean the only one I felt unsure of having any doubt on was that last defendant, was Bruce Kay and I have --

THE COURT: You may have felt, but did you finally reach a conclusion that you want reported and made part of the verdict in this case?

JUROR NO. 10, JUDITH EARL: Yes, I said that I do.

THE COURT: And you do that freely, and that is the point that we are trying to find out.

Are you under any pressure? It is your judgment, your own mind has to make the decision.

JUROR NO. 10, JUDITH EARL: I concede that Bruce Kay is guilty.

THE COURT: Do you say he is guilty?

JUROR NO. 10, JUDITH EARL: Yes.

THE COURT: Now. I am going to take her verdict and her judgment.

As evidenced by the above exchange, the trial judge exercised his discretion in assessing the nature of Miss Earl's confusion. It is well settled that a trial judge has the discretion in assessing the impact of a juror's statement during a jury poll. The uncertainty of a juror in the first instance concerning a verdict does not require setting aside the verdict if a polling of the jury can clear up the apparent confusion. Williams v. United States, 136 U.S. App. D.C. 158, 419 F.2d 740 (1969); United States v. Lockhart, 366 F.Supp. 843 (E.D. Pa. 1973). While it is well settled that the Court cannot coerce a juror to obtain a final verdict, it can attempt to bring clarity where there may have been confusion, as the judge did in the present case. United States v. Duke, 527 F.2d 386 (5th Cir. 1976); Amos v. United States, 496 F.2d 1269 (8th Cir. 1974), cert. den. 419 U.S. 896 (1974).

Neither can a judge force a juror to make a decision in open court when the juror was previously undecided as in United States v. Sexton, 456 F.2d 961 (5th Cir. 1972). There is no question that Miss Earl had made her decision of guilty previous to the polling. The judge's attempt to clarify her response cannot be construed as forcing her to make a decision in open court. Her decision had been made previous to the polling, as evidenced by the following inquiry by the Court (tr. 2310-11).

THE COURT: You may have felt, but did you finally reach a conclusion that you want reported in this case? (emphasis added).

JUROR NO. 10, JUDITH EARL: Yes, I said that I do.

The fact that Miss Earl may have initially harboured some doubts as to defendant Kay's guilt, but subsequently assumed the jury's finding prior to the foreman's announcing the verdict is not an irregularity requiring reversal, as this Court found in Grace Line, Inc. v. Motley, 439 F. 2d 1028, 132 (2nd Cir. 1971). In that case one of the jurors remarked about the necessity for unanimity. In regard to this remark the court found that:

Her explanation makes it clear that during the jury's deliberation she had taken a contrary view, but had won no one over to her position, and in the interests of achieving a verdict, she made the vote of the jurors unanimous for the defendant. There was no hint of coercion or improper conduct on her part as on the part of the jury or anyone else connected with the case. She was animated by a motive apparently entirely her own which was not unlawful.

In the instant case, since Miss Earl expressly joined in the verdict, the court upheld the decision of the jury.

As Chief Judge Lumbard stated in Grace Lines, Inc., supra, at 1033:

Moreover, a reasonable juror knows that even though he might prefer to have the jury reach a different result it is also important to reach a result. Hence, he does not hesitate to re-examine his original views and to give up his opinion if convinced, by the fact that everyone else has contrary views, that his opinion is

erroneous. He seeks primarily to agree upon a verdict so long as he can do so without violating his individual judgment and conscience.

The fact that at no time did Miss Earl state she was coerced or in disagreement with the verdict is illustrative of her concurrence in the jury's verdict. Her responses were only an attempt to convey the difficulties endemic to finding another guilty. Indeed, Miss Earl's confusion primarily regarded whether Bruce Kay assumed leadership of the conspiracy. At no time did she indicate doubt as to his continuous participation in the conspiracy of which there was substantial evidence, as reflected by her following statement:

JUROR NO. 10, JUDITH EARL: The other point that I had some doubt on, and I am only saying this because of my reasonable doubt and I feel that it is reasonable, was the points that were made about Bruce Kay taking over the conspiracy, and I felt that I have reasonable doubt about that. (emphasis added).

The defendants' further contention that the trial court erred in not directing the jury to continue deliberations pursuant to Rule 31 of the Federal Rules of Criminal Procedure is a misconstruction of that rule. It is clear that further deliberations in such a case are within the discretion of the court. Further, deliberations need not be required when the trial court attempts to obtain clarity from a juror rather than to coerce a final verdict. As the court said in Amos v. United States, supra, at 1273, "Rule 31(d) gives the court some latitude in the polling of the jury to clear up an apparent confusion."

Finally, it was held in Jackson v. United States, 386 F 2d 641, 128 U. S. App. D. C. 214 (1967), a case where a juror manifested similar confusion, that:

Although the court's inquiry did not perhaps exhaust the solicitude appropriate to a situation of this kind, particularly where the circumstances actually obtained are difficult to communicate to an appellate court in a cold record, we are not prepared to say that the court erred in its appraisal at the time of the genuineness of Mrs. Knight's verdict.

As suggested by the above holding in Jackson, Chief Judge Foley, having been present throughout the trial and having assessed the respective jurors and trial atmosphere for three weeks, was in the best position to appraise the genuineness of Miss Earl's statement. As Chief Judge Foley stated in his opinion at page 6:

After duly inquiring as to the meaning and import of this comment by juror No. 10, and after having observed her other behaviour during the course of the trial and jury deliberations, it is my firm judgment that there is no doubt that she intended to and did record a guilty verdict with respect to defendant Kay which was voluntary and free from coercion and from reasonable doubt.

In light of the dialogue between the trial court and Miss Earl, the government urges that the court did not err in its appraisal of the genuineness of her verdict of guilty reiterated to the court no less than seven times. Accordingly, neither a new trial nor an evidentiary hearing should be ordered.

POINT IV

THE GOVERNMENT FULFILLED ITS DUTY TO THE DEFENSE BY DISCLOSING ITS INFORMER'S IDENTITY AND ALL OF ITS KNOWLEDGE AS TO HER WHEREABOUTS.

The defendants contend that the trial court erred in refusing to require the government to make a diligent search for informant Beucher or to disclose to the defense its efforts to secure her appearance.

The Supreme Court held in the case of Roviaro v. United States, 353 U. S. 53, 60-61 (1957) that

where the disclosure of an informer's identity or of the contents of his communication is relevant and helpful to the defense of an accused, or is essential to a fair determination of a case, the privilege (of nondisclosure) gives away. In these situations, the trial court may require disclosure, and if the government withholds the information, dismiss the action.

This court recently held in United States v. Turbide, 558 F.2d 1053 60 (2nd Cir. 1977):

that even when the Roviaro test as to the need for disclosure is met, the government does not become the guarantor of its informer at trial and does not have a duty to produce him. All that the defendant is entitled to is the informer's name, and such information the government has concerning his whereabouts, and reasonable cooperation in securing his whereabouts.

The government fulfilled its duty to disclose the identity of its informant on November 30, 1976, tr. 7. Along with its disclosure of Beucher's identity, the government provided the defense with all of its information concerning Miss Beucher's whereabouts.

Further authority as to the government's adequate performance of its duty to disclose to the defense information concerning its informant can be found in this Court's decision in United States v. Super, 492 F.2d 319 (2nd Cir. 1974). In that case, as in the case presently before the Court, the government advised the defense counsel "on the eve of trial" that a confidential informant was involved. The government provided the informant's name and his last known address. The government further notified the defense that the informant was not within its control, and that his present whereabouts were unknown. This Court held that the disclosure shortly before the commencement of the trial "fully complied with the obligation of the government under Roviaro." *id.* 321.

Similarly, the government in this case has also fulfilled its duty to disclose under Roviaro as indicated by this Court's ruling in Super. There is nothing in the record to rebut the government's contention that Beucher's whereabouts were unknown. Thus, the government's disclosures, made in good faith, must be accepted.

POINT V

DUE PROCESS WAS NOT VIOLATED BY THE PROSECUTOR'S FAILURE TO ELICIT PRIOR INCONSISTENT STATEMENTS OF A WITNESS BEFORE THE GRAND JURY.

First, the defendants' assertion that Paul Moscovitz committed perjury before the grand jury is not supported by the record. The evidence of record makes it clear that Moscovitz made prior inconsistent statements to a DEA agent about a trip to Tucson in June, 1974 by Moscovitz and one Margaret Beucher and that these statements conflicted with his grand jury and trial testimony. When Moscovitz was cross-examined by counsel for Levy and Cooney, he denied that his

grand jury testimony was false and asserted that trial testimony about the events of June, 1974, which was consistent with his grand jury testimony, was true. Accordingly, the issue before this Court is not whether perjury before the grand jury may have been overlooked, but whether there is a duty on the part of the prosecutor to present prior inconsistent statements to the grand jury concerning one of many events because the prior statement may have affected the credibility of Moscowitz. In this regard, it is pointed out that Margaret Beucher, the sole object of Moscowitz' dissatisfaction and the subject of the prior statement, appeared before the grand jury and corroborated the testimony of Moscowitz about the trip to Tucson in June, 1974.

Second, it is noted that the general allegation that Moscowitz committed perjury before the grand jury, as evidenced by tape recorded conversations between Cooney and Moscowitz in June, 1976⁵, wherein Moscowitz attempted to obtain money from Cooney, was not made known to the government until the close of the government's case when the transcript of the tape recording was provided to the prosecutor. On redirect examination of Moscowitz, the government sought to show that his post-indictment statements to Cooney over the telephone were, in fact, false and designed to induce Cooney to provide him with money.

Finally, in closing argument the government, surprised by the tape recording and post-indictment events (tr. 2062-2063), referred to Moscowitz as an enigma in terms of credibility and a "self-serving swindler,"

5. the entire transcript of the conversations appears at tr. 1940-1975, 1976b-1976c.

and invited the trial jury to discount his uncorroborated testimony.

The general principle applicable to the foregoing events is well-stated in United States v. Guillette, 547 F.2d. 743, 753 (2d Cir. 1976):

An indictment returned by a legally constituted and unbiased grand jury generally is not subject to attack on the ground that it is based on inadequate or incompetent evidence. United States v. Callandra, 414 U.S. 338, 345, 94 S.Ct. 613, 38 L.Ed. 2d 561 (1974); Costello v. United States, 350 U.S. 359, 363, 76 S.Ct. 406, 100 L.Ed. 391 (1956). The government, however, is subject to certain restrictions on its relationship with the grand jury and the type of evidence it may present to obtain an indictment. See United States v. Basurto, 497 F.2d 781, 785-86 (9th Cir. 1974); United States v. Gallo, 394 F.Supp. 310, 315 (D.Conn. 1975). For example, where the government knows that perjured testimony has been given to the grand jury and that this testimony is material to the grand jury deliberations, due process requires that the prosecutor take such steps as are necessary to correct any possible injustice. United States v. Basurto, *supra*. Where jeopardy has not yet attached, it generally is proper for the prosecutor to return to the grand jury and seek a new indictment untainted by the perjury..... but we decline to adopt the proposition that grand jury testimony that has merely been thrown open to suspicion by postindictment events is an invalid basis for an indictment. Such a rule of law would necessitate independent judicial review of the credibility of grand jury witnesses, an exercise that would seriously infringe upon the traditional independence of the

grand jury. We consequently hold that where subsequent events merely cast doubt on the credibility of grand jury witnesses, due process does not require the prosecution to notify the grand jury of those events and seek a new indictment. *id* at 753.

In United States v. Basurto, 497 F2d. 781 (9th Cir. 1974), the prosecution learned of perjured testimony as to a material matter before the grand jury prior to commencement of trial and referred to it in the opening statement. Moreover, the court pointed out in Basurto that the perjurer was the only witness to testify before the grand jury about the subject matter in question. Under the circumstances, the prosecutor had a duty to inform the court and grand jury to correct an injustice. In United States v. Kennedy, 564 F2d. 1329 (9th Cir. 1977), a case involving similar issues, the court stated that "it must be emphasized that Basurto deals with a case of undisputed perjury by the key witness presented to the grand jury." *Id.*, at 1336.

In Kennedy, *supra*, the prosecutor failed to present to the grand jury exculpatory evidence. The court held:

We believe that the rule to be distilled from the authorities discussed must be that only in a flagrant case, and perhaps only where knowing perjury, relating to a material matter, has been presented to the grand jury should the trial judge dismiss an otherwise valid indictment returned by an apparently unbiased grand jury. To hold otherwise would allow a minitrial as to each presented indictment contrary to the teaching by Mr. Justice Black in Costello, *supra*. *id.* 1338.

See also, United States v. Ruyle, 524 F. 2d 1133 (6th Cir. 1975) cert. denied, 425 U. S. 934 (1976).

In United States v. Provenzano, 440 F.Supp. 561 (S. D. N. Y. 1977), the government, in seeking a superseding indictment, read into the grand jury record the prior grand jury testimony of a witness who recanted the said testimony prior to the second grand jury investigation, notwithstanding the availability of the witness during the investigation. Additionally, the testimony concerned the accuracy of a single witness' identification of the defendant. Accordingly, the court granted a defense motion to dismiss the indictment.

In the instant case, the government elicited from Moscowitz grand jury testimony about several events occurring between 1972 and 1975. Although it failed to confront him with prior inconsistent statements recorded by a DEA agent during interviews, the government produced a corroborating witness, Margaret Beucher, to testify about the same events. Use of the prior statements before the grand jury would have gone strictly to the issue of credibility of a witness concerning the details of one of many transactions. Although better practice may have called for the use of such statement, it cannot be said in view of existing authority and the corroborative testimony before the grand jury that failure to elicit the prior statement violated due process.

CONCLUSION

For the foregoing reasons, the Judgments of Conviction appealed from should be affirmed.

Respectfully submitted,

George H. Lowe
United States Attorney
Northern District of New York

by:

William J. Dreyer
Assistant United States Attorney

May 25, 1978

APPENDIX

EXTRACT OF TRIAL TESTIMONY - PAUL MOSCOWITZ.

* * * * *

Moscowitz-Forth Government-Cross

1412

MR. LOMBARDINO: That is
page eight-five, Mr. Dreyer.

BY MR. LOMBARDINO:

Q And when you went to the Grand Jury, and when you
were under oath, you testified about this trip that
you made sometime in June of 1974 and you told
this to the Grand Jury, what you are telling us here?

A Right.

Q And you told them in the Grand Jury of how, you,
alone, drove back with this quantity of Marijuana?

A Correct.

Q And that was true, wasn't it?

A Correct.

Q And that was true, wasn't it?

A Correct.

Q And it is true today, isn't it?

A Correct.

Q Now, you remember speaking to Mr. Tripp, don't
you?

A Yes.

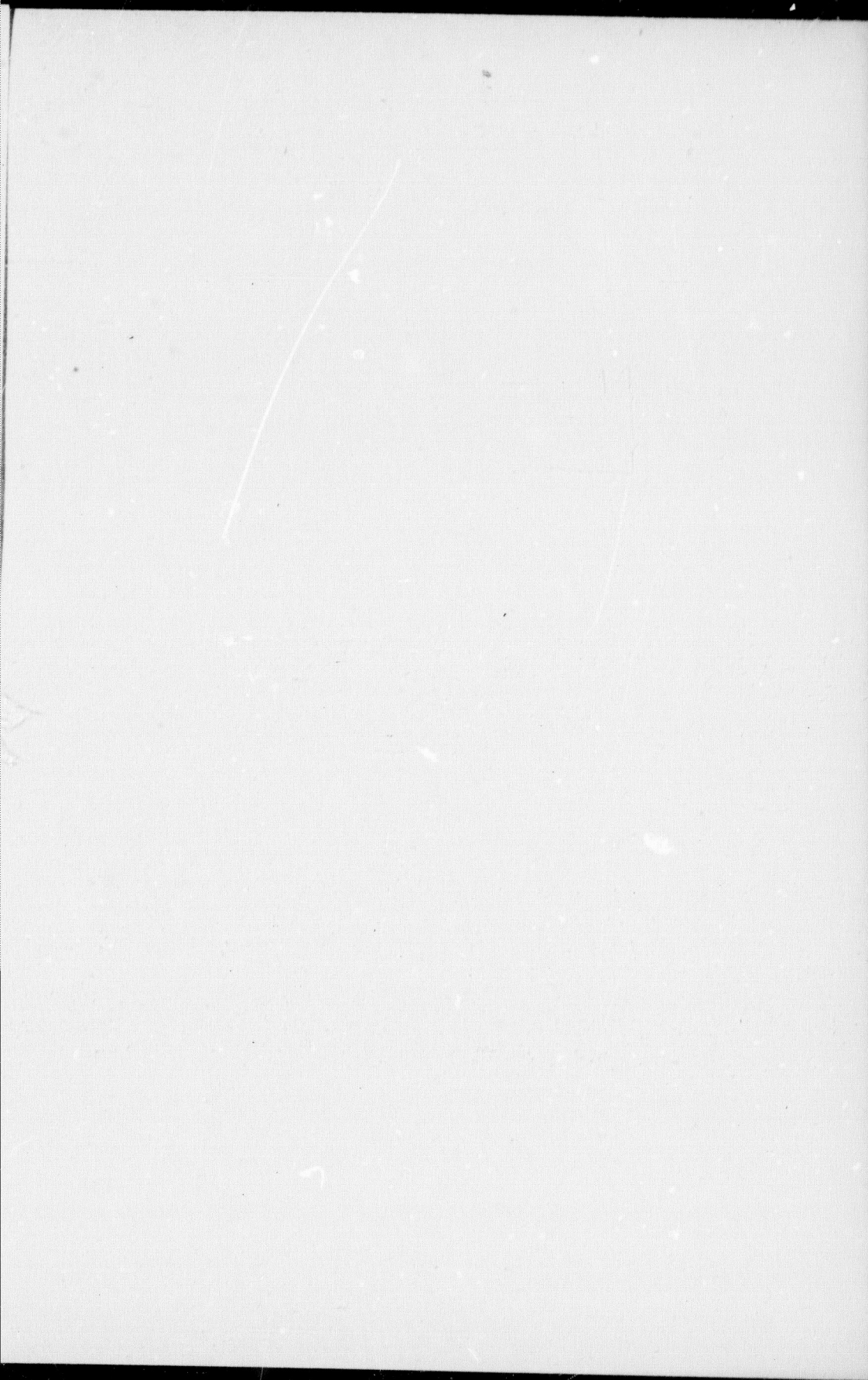
Q And you remember speaking to Mr. Tripp on Sep-
tember 26th, 1975?

A Yes.

MR. LOMBARDINO: I would like
to have this marked for Identification, Your Honor.

THE CLERK: Defendants' Ex-
hibit H, marked for Identification.

(Document marked Defendants'
Exhibit H,



EXTRACT OF TRIAL TESTIMONY - PAUL MOSCOWITZ.

Moscowitz-for the Government-Cross

1413

for Identification.)

BY MR. LOMBARDINO:

Q Would you take a look at Defendants' Exhibit H and I refer you to paragraph three, and would you look at that, Mr. Moscowitz (Offering)?

Did you read it, Mr. Moscowitz?

A Yes.

Q May I have it back, please. Do you want to read it again?

A Yes, I would like to.

Q Sure, read it again. Did you read paragraph three?

A Yes.

Q Now, may I have it back.

A Yes. (Offering).

Q Now, isn't it a fact that you told Agent Tripp that you never drove back any Marijuana, that there was a misunderstanding with Meg, and you returned to the state of New York?

A Correct.

Q And when you told that to Agent Tripp, was that the truth, or was that a lie?

A That I --

Q That you didn't bring back Marijuana in June of 1974 -- you lied to Mr. Tripp?

A Right, that was a lie.

EXTRACT OF TRIAL TESTIMONY - PAUL MOSCOWITZ.

Moscowitz-for the Government-Cross

1414

Q And that was before you went to the Grand Jury?
A Correct.

Q Now, before going into the Grand Jury, did you tell Mr. Dreyer that you lied to Agent Tripp when you told him, on September 26th, 1975, that you never brought back Marijuana from Arizona? Did you tell it to him? And I refer to this gentleman here, did you tell him you lied about that to Agent Tripp?
A No, I told Ray Tripp.

Q And when did you tell Agent Tripp that you lied?
A When he was questioning me about -- about Meg Boucher.

Q And when you went into the Grand Jury, did you tell those good people there that listened to your story that you had lied about this trip?
A No.

Q And when was the first time that you ever told Mr. Dreyer the fact that you lied about this trip, or did you ever tell it to him?

A From what I understood, he was supposed to have learned it from Mr. Tripp.

Q Mr. Moscowitz, I am asking you if you ever told Mr. Dreyer that you lied to Agent Tripp about bringing back Marijuana from Kevin Cooney? Did you ever tell it to him?

A Not that I recall.

EXTRACT OF TRIAL TESTIMONY - PAUL MOSCOWITZ.

Moscowitz-for the Government-Cross

1415

Q Now, when you now went into the Grand Jury, and incidentally, was your memory better when you were telling agent Tripp about the facts, or did your memory get better later on, when months passed, and you were then called to the Grand Jury?

When did your memory get better?

A When I was incarcerated at Saratoga Jail. I wrote a diary of everything that I could possibly put down in my mind regarding this case, and, at that time, I was very angry at Miss Boucher and I wanted her to be indicted, too, as well.

Q And because you were angry at Miss Boucher, you wanted her to be indicted --

THE COURT: You are talking to the jury again. You will have an opportunity to talk to them.

MR. LOMBARDINO: I am sorry.

THE COURT: You should direct your questions to the witness.

MR. LOMBARDINO: I am sorry.

BY MR. LOMBARDINO:

Q And because you were angry at that woman, whom you lived with and shot-up together with, you testified and told things to Agent Tripp, that caused her to be indicted?

MR. DREYER: Objection, Your Honor. It is

EXTRACT OF TRIAL TESTIMONY - PAUL MOSCOWITZ.

Moscowitz-for the Government-Cross

1416

a misstatement.

MR. LOMBARDINO: Well, Your Honor, that is what the witness said.

THE COURT: Wait a minute. Read back the last two questions and answers.

(The previous two questions and answers were read by the Reporter.)

THE COURT: What is your objection?

MR. DREYER: It is a misstatement of what Mr. Moscovitz said.

MR. LOMBARDINO: That is my question.

THE COURT: I will let him answer it.

THE WITNESS: Miss Boucher was not indicted.

BY MR. LOMBARDINO:

Q You wanted to see if you could have her indicted, isn't that a fair statement?

A Yes, sir.

THE COURT: I think it is nearly time for our luncheon recess and I want to ask you: how much more do you have? It will be a short afternoon.

MR. LOMBARDINO: I am afraid I have a lot. I will do the best I can but there is a lot of material that I want to cover.

THE COURT: About how much more, do you

* * * * *

PRIOR INCONSISTENT STATEMENT OF PAUL
MOSCOWITZ, EXTRACTED FROM DEFENDANT'S H.*

3. Reference is made to paragraph 14 of the aforementioned report wherein it is reported that "on about the second week of June 1974, SC750004 and Margaret BUECHE traveled to Tucson, Arizona to visit with Kevin COONEY and transport a shipment of marihuana back to Albany. SC750004 and BUECHE transported 300 pounds of marihuana back to Albany during the third week of June 1974 after remaining in Tucson about a week." SC750004 has advised that that event was incorrectly reported. It should read rather that SC750004 and BUECHE traveled to Tucson with the intention of visiting the COONEYS and returning to the Albany area with a shipment of marihuana. However, BUECHE had a disagreement with COONEY and Harold LEVY regarding how much they (BUECHE and SC750004) would be paid for transporting a shipment of marihuana to Albany. BUECHE'S contention was that they were not being offered enough money for the risks involved. Consequently, Sondra HUNT, @Sunny BROOKS, transported that 300 pounds of marihuana to Albany, rather than BUECHE and SC750004.

* Extract of exhibit is included herein upon stipulation with counsel for defendants Cooney and Levey.

GRAND JURY TESTIMONY OF MARGARET BEUCHER.

* * * * *

Buecher

124.

May?

A Towards the end of May.

Q Was Miss Hunt with her the whole time? Did Miss Hunt leave with her?

A As much as I can recall, yes.

Q What did they use for transportation when they were in the area?

A I believe they used one of Buddy's cars.

Q How did they leave the area? With one of Buddy's car's or by commercial transportation?

A I don't recall.

Q I direct your attention to June 1974. Do you recall June 1974?

A Yes.

Q You do recall?

A Yes

Q Is there anything unusual that you recall about June 1974?

A Yes.

Q What is it that you recall about that month?

A Paul Moskowitz and I took a trip out to Tuscon.

Q When did you decide to take that trip?

A It was decided when Chris and Sonny were in town.

Q What did you decide to do specifically?

A Our purpose was to go out to Tuscon and drive a load of

GRAND JURY TESTIMONY OF MARGARET BEUCHER.

Buecher

125.

pot back.

Q Did you subsequently take your trip?

A Yes.

Q You make any preparations for your trip? Specifically did you visit anybody's house prior to making your trip?

A Yes.

Q Did anybody else know about your trip?

A Yes.

Q Who?

A Harold Levy.

Q What did he know about your trip?

A He knew we were going.

Q Did he help you in the preparation of your trip?

A Yes.

Q How?

A He recalled specifics, when Kevin talked about it with Paul and told us some of the procedures.

Q Were you present when he discussed the procedures?

A Partially.

Q Do you remember any such procedures?

A Yes.

Q Can you give us a brief description of what he said?

A He warned us not to drive at night. To try and look and act as straight as possible.

Q Go ahead.

GRAND JURY TESTIMONY OF MARGARET BEUCHER.

Buecher

126.

- A To observe speed limits.
- Q Do you recollect anything else?
- A Not to carry personal records.
- Q Did you subsequently go to Tuscon?
- A Yes.
- Q How long did it take you to get out there?
- A A few days.
- Q What did you do when you got there?
- A Paul called Kevin up and Kevin led us into town, to his house. We stayed at Kevin and Chris's house.
- Q Do you recall the house?
- A Vaguely.
- Q Was it an apartment?
- A No, it was a house.
- Q Do you recall where it was located?
- A No.
- Q Do you recall anything unusual occurring at that house?
- A I don't know what you mean by unusual.
- Q You have any discussions about the marijuana operation?
- A Myself? No.
- Q You have any occasion to use any drugs at that house?
- A Yes.
- Q Who produced the drugs?
- A Kevin and Chris.
- Q What did he produce?

GRAND JURY TESTIMONY OF MARGARET BEUCHER.

Buecher

127.

A Pot, heroin and pills.

Q Did he sell those to you?

A Not to me.

Q Were any of these quantities of pot, heroin or pills at the house given to you for purposes of taking them back to Albany, New York?

A Not at the house, no.

Q You have occasion to go to another house in Tuscon?

A Yes.

Q Please describe what you observed.

A It was at night. It was a house with a chain link fence around it.

Q Was it in Tuscon?

A As far as I know.

Q Anybody tell you who owned the house?

A No.

Q Did you have occasion to learn who owned the house, that is at a subsequent time?

A Specifically? I don't recall.

Q What did you do when you got to this house while you were in Tuscon in June?

A I stayed in the garage. I don't recall being inside the house.

Q Anybody tell you the purpose of going to that house?

A Yes.

GRAND JURY TESTIMONY OF MARGARET BEUCHER.

Buecher

128.

- Q Who told you?
A I don't recall.
- Q You have occasion to go into the house that night?
A Oh. Yes.
- Q Did you see anything in the house?
A Yes.
- Q What?
A Pot.
- Q How much?
A A lot.
- Q Will you describe how much a lot is? You see it packaged?
A Yes.
- Q How was it packaged?
A In brick form.
- Q How were these packages arranged?
A Some were in suitcases. Some just covered.
- Q Would you be able to describe in terms of feet, pounds, inches, the quantity of marijuana that you observed?
A I would venture a guess and say it was at least several hundred pounds.
- Q Again, please.
A About several hundred pounds.
- Q You say some of the marijuana was loaded in suitcases?
A Yes.
- Q Did you help load any of the marijuana in the suitcases?

GRAND JURY TESTIMONY OF MARGARET BEUCHER.

Buecher

129.

A No.

Q You observe anybody load marijuana into the suitcases?

A Yes.

Q Who did you observe do that?

A Kevin and Paul.

Q What kind of suitcases did they load this marijuana into?

A Green suitcases and garment bags.

Q What did they do with them?

A Loaded them into a car.

Q You help load the car?

A I believe I put one suitcase in the car.

Q How long did it take you to load the car?

A I really don't know.

Q After you loaded the car, did you have occasion to observe the house again? Specifically, did any marijuana remain inside the house?

A Yes.

Q Did you observe that marijuana?

A Yes.

Q How much remained?

A Still several hundred pounds.

Q Do you know how much you loaded into the automobile?

A Specifically, no.

Q What happened after you completed loading the automobile?

A I went back to Kevin and Chris', with Kevin.

GRAND JURY TESTIMONY OF MARGARET BEUCHER.

Buecher

130.

Q What happened to Paul?

A He left for Albany.

Q Immediately after you loaded the car?

A As far as I can remember.

Q Did you not help Paul drive that marijuana back?

A No.

Q Had you originally intended to help drive it back?

A Yes.

Q Did there come some time when you decided not to help drive it back?

A Yes.

Q What is the reason for that?

A I thought it was foolish for us to both be put in such a precarious situation.

Q Actually did you stay in Tuscon?

A Yes.

Q How long?

A Just a few days.

Q What did you do then?

A Shopped.

Q You have occasion to come back to the Albany area?

A Yes.

Q When?

A A few days after that.

Q How did you do that?

GRAND JURY TESTIMONY OF MARGARET BEUCHER.

Buecher

131.

- A I got a ride with a friend of Chris'.
- Q How long did it take you to get to Albany?
- A A couple of days.
- Q After you returned to the Albany area you have occasion to learn that the shipment when Paul left Tuscon had been received?
- A Yes.
- Q From whom did you learn that?
- A From Paul.
- Q From anyone else?
- A I don't recall.
- Q Directing your attention to the summer of 1974, after you returned from Tuscon, did you continue to see Buddy Levy at this time?
- A Yes.
- Q Frequently or infrequently?
- A Rather frequently.
- Q You have occasion to discuss with him the business ventures that you previously testified to?
- A Yes.
- Q Describe to the Grand Jury the nature of the conversations you had?
- A Buddy also wanted to filter some money through his newly formed business.
- Q He tell you that?

* * * * *

Affidavit of Service

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Re **United States of America vs. Kevin Cooney, Harold Levy, John LeFebvre
and Bruce Kay**

State of New York)
County of Onondaga ss.:
City of Syracuse)

DONALD C. QUINN,

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Attorney(~~X~~) for **Appellee,**

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Commissioner of Deeds

cc: **George H. Lowe**
United States Attorney

